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BEFORE THE ARIZONA CORPORATION COMMISSION

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GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

AZ CORP COMMISSION  
DOCKET CONTROL

In the matter of:

JERE PARKHURST and MICHELLE  
PARKHURST, husband and wife, doing  
business as C-Street Financial Group and C-  
Street Development, L.L.C.;

C-STREET HOLDINGS, L.L.C., a dissolved  
Arizona limited liability company; and

PHOENIX FINANCIAL HOLDINGS, L.L.C.,  
a terminated Arizona limited liability  
company;

Respondents.

DOCKET NO. S-20761A-10-0409

SECURITIES DIVISION'S MOTION TO  
ALLOW TELEPHONIC TESTIMONY

Hearing Dates: April 13-14, 2011

(Assigned to the Hon. Marc E. Stern)

The Securities Division ("Division") of the Arizona Corporation Commission hereby  
moves for leave to present the telephonic testimony of prospective Division witnesses during the  
hearing of the above-referenced matter beginning on April 13, 2011. The following out of town  
witnesses are expected to be called to provide testimony regarding their investment with the  
Respondents:

1. Michael Olsen, Denver, Colorado
2. Elaine D'Aprile, Washington, D.C.

Arizona Corporation Commission

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*[Signature]*

1 This request is submitted on the grounds that, although these individuals can provide testimony  
2 that will provide relevant information at this administrative hearing, special circumstances  
3 prevent their actual appearance in Phoenix, Arizona during the course of this proceeding.

4 For this primary reason, and for others addressed in the following Memorandum of Points  
5 and Authorities, the Division's Motion to Allow Telephonic Testimony should be allowed.

6 Respectfully submitted this 1<sup>st</sup> day of March, 2011.

7  
8 By \_\_\_\_\_  
9 Aikaterine Vervilos  
10 Attorney for the Securities Division of the  
11 Arizona Corporation Commission

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 The Division anticipates calling Elaine D'Aprile ("Ms. Aprile") and Michael Olsen ("Mr.  
15 Olsen") and as central witnesses to this hearing. The witnesses can offer probative testimony as to  
16 this case. In so doing, they can provide evidence supporting a number of the allegations brought by  
17 the Division in this case. Ms. D'Aprile resides in Washington, D.C. and Mr. Olsen resides in  
18 Denver, Colorado. As such, the burdensome task of traveling down to Phoenix to provide testimony  
19 in person is impractical for these witnesses.

20 The prospective witnesses above can offer highly probative evidence in this matter, yet  
21 they face one or more obstacles that prevent their appearance at this hearing. The simple and  
22 well-recognized solution to this problem is to allow for telephonic testimony; through this  
23 manner, not only will relevant evidence be preserved and introduced, but all parties will have a  
24 full opportunity for questioning - whether by direct or cross-examination.

25 ...

26 ...

...

1 **II. ARGUMENT**

2 **A. *Telephonic Testimony in Administrative Hearings is Supported Both***  
3 ***Under Applicable Administrative Rules and through Court Decisions***

4 The purpose of administrative proceedings is to provide for the fair, speedy and cost  
5 effective resolution of administratively justiciable matters. To effectuate that purpose, the  
6 legislature provided for streamlined proceedings and relaxed application of the formal rules of  
7 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of  
8 contested administrative cases. The evidence submitted in an administrative hearing need not  
9 rise to the level of formality required in a judicial proceeding, as long as it is “substantial, reliable  
10 and probative.” In addition, the Commission promulgated rules of practice and procedure to  
11 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*  
12 A.A.C. R14-3-101(B); R14-3-109(K).

13 Pursuant to A.A.C. R2-19-114, an administrative law judge (“ALJ”) may grant a motion  
14 for telephonic testimony if 1) personal attendance by a witness will present an undue hardship; 2)  
15 telephonic testimony will not cause undue prejudice to any party; and 3) the proponent of the  
16 telephonic testimony pays for the cost of obtaining the testimony telephonically. Allowing Mr.  
17 Olsen and Ms. D’Aprile to testify by telephone does not provide any undue prejudice to any  
18 party and retains all indicia of reliability and preserves Respondents’ right to cross-examination.

19 Consistent with these administrative rules, courts have routinely acknowledged that  
20 telephonic testimony in administrative proceedings is permissible and consistent with the  
21 requirements of procedural due process. *See* A.A.C. R2-19-114. In *T.W.M. Custom Framing v.*  
22 *Industrial Commission of Arizona*, 198 Ariz. 41 (2000), the appellant challenged an validity of an  
23 ALJ’s judgment, partly on the fact that the ALJ had allowed two of the Industrial Commission’s  
24 witnesses to appear telephonically. The Court initially noted that telephonic testimony was  
25 superior to a mere transcription of testimony because the telephonic medium “preserves  
26 paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in making  
determinations of credibility.” *See T.M.W. Custom Framing*, 198 Ariz. at 48. The court then

1 went on to recognize that “ALJs are not bound by formal rules of evidence or procedure and are  
2 charged with conducting the hearing in a manner that achieves substantial justice.” *Id.* at 48,  
3 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic  
4 testimony offered in this case was fully consistent with the requirement of “substantial  
5 justice.” *Id.*

6 Other courts have reached similar conclusions with respect to the use of telephonic  
7 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of*  
8 *Industrial Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was  
9 asked to review a trial court’s determination that a hearing officer’s admittance of an inspector’s  
10 telephonic testimony violated C & C’s due process rights and prejudiced C & C by preventing it  
11 from cross-examining the inspector’s notes. The appellate court rejected the trial court’s  
12 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative  
13 hearing of this nature need not be conducted according to the technical rules relating to evidence  
14 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court  
15 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*  
16 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the  
17 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings  
18 involving telephonic testimony as:

19 “a pragmatic solution, made possible by modern technology, which  
20 attempts to reconcile the problem of geographically separated adversaries  
21 with the core elements of a fair adversary hearing: the opportunity to  
cross-examine adverse witnesses and to rebut or explain unfavorable  
evidence.” *Id.* at 251, 131 Cal.Rptr. at 422.

22 Based on similar reasoning, a number of other state courts have recognized that, in the  
23 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and  
24 consistent with the requirements of procedural due process. See, e.g., *Babcock v. Employment*  
25 *Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division’s  
26 procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238,

1 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).  
2 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of  
3 administrative hearings, “fundamental fairness” is not compromised through the allowance of  
4 telephonic testimony.

5 The telephonic testimony request in the present case fits squarely within the tenor of these  
6 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could  
7 not otherwise appear in a Phoenix hearing room without causing undue hardship to the witnesses;  
8 the prospective testimony of these witnesses will be “substantial, reliable and probative,” and  
9 will meet all requirements of substantial justice. In other words, evidence bearing on the  
10 outcome of this hearing will not be barred, and respondents will still have every opportunity to  
11 question the witnesses about their testimony and/or about any exhibits discussed.

12 **B. *The Arizona Corporation Commission has a well-recognized History of***  
13 ***Permitting Telephonic Testimony during the Course of Administrative Hearings***

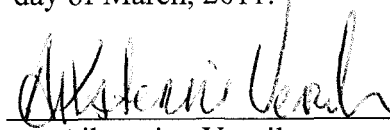
14 In light of the relaxed evidentiary and procedural rules governing administrative hearings  
15 in this state, and because telephonic testimony does not jeopardize the fundamental fairness  
16 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of  
17 telephonic testimony in their administrative hearings to introduce probative evidence. *See, e.g.,*  
18 *In the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the*  
19 *matter Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan*  
20 *Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services,*  
21 *Corporation et al.*, Docket No. S-03177A-98-000.

22 **III. CONCLUSION**

23 Permitting Ms. D’Aprile and Mr. Olsen and to testify telephonically at the upcoming  
24 administrative hearing allows the Division to present relevant witness evidence that is expected to  
25 be reliable and probative, is fundamentally fair, and does not compromise Respondents’ due  
26 process rights. Therefore, the Division respectfully requests that its motion for leave to present  
such telephonic testimony be granted.

1 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of March, 2011.

2  
3 By



Aikaterine Vervilos

Attorney for the Securities Division of the  
Arizona Corporation Commission

5 ORIGINAL AND EIGHT (8) COPIES  
6 of the foregoing filed this 1<sup>st</sup> day of March,  
2011, with

7 Docket Control  
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1200 W. Washington St.  
9 Phoenix, AZ 85007

10 COPY of the foregoing hand-delivered  
11 this 1<sup>st</sup> day of March, 2011, to:

12 Administrative Law Judge Marc Stern  
13 Arizona Corporation Commission  
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15 COPY of the foregoing mailed and e-mailed  
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20 this 1<sup>st</sup> day of March, 2011, to:

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